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In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, PETITIONER

v.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on December 1, 1941.

OPINIONS BELOW

The opinions of the Court of Claims (R. 26–36) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1941 (R. 36). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the United States impliedly warrants that the time for completion specified in a standard form government construction contract is adequate for the performance of the contractor's work.

2. Whether Article 4 or any other provision of a standard form government construction contract obligates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of another contractor on account of unforeseen subsurface conditions.[1]

STATEMENT

This is a suit to recover from the United States damages due to delays in the performance of a Government contract for which the United States is alleged to be responsible. The facts, as found by the Court of Claims (R. 17–26), are as follows:

On April 29, 1932, the D. C. Engineering Company, Inc., of which respondents are the receivers, entered into a standard form construction contract with the United States, acting through the Director of Construction of the Veterans' Admin-

[1] If the petition for a writ of certiorari is granted, the United States will also urge that even if Article 4 applies, no recovery can be had here because there is no showing that an appeal from the contracting officer's rejection of the claim under Article 4 was made to the head of the department, as provided in Articles 4, 3, and 15, and because Article 4 does not obligate the United States in any case to make compensation for delays resulting from change orders.

istration, to supply and install the plumbing, heating equipment, and electrical work in the Veterans' Administration Home, to be constructed at Togus, Maine (R. 20). The Government's invitation to bid, dated March 12, 1932, indicated that the home was to be constructed under four separate contracts, (a) general construction, (b) plumbing, heating, and electrical work, (c) electric elevators, and (d) refrigerating plant; that the general contractor would prepare the site and construct the building; and that the mechanical equipment called for by the other contracts was to be installed, in accordance with the plans and specifications, as the building progressed (R. 17–19). All of the plans and specifications were included in one volume, and were to be included in each of the four contracts (R. 17). Bidders for the plumbing contract were notified that their work was to be completed at a date not later than that provided for the completion of the general construction contract (R. 19). Before submission of its bid, the respondents' company conferred with the Government's contracting officer to determine when the work of construction would commence; it was advised by him that construction would commence in the early spring of 1936, as soon as weather conditions would permit, so that the building would be under roof and enclosed before the cold weather (R. 20–21).

The respondents' contract contained the standard provisions permitting the Government to

issue change orders within the general scope of the contract and specifications (Art. 3; R. 8, 21); covering changes due to the discovery of subsurface and/or latent conditions materially differing from those shown on the drawings, or indicated in the specifications (Art. 4; R. 8, 21); and requiring the contractor to cooperate fully with the other contractors on the job, to fit his own work to that provided under the other contracts, and not to interfere in any way with their performance (Art. 13; R. 12, 19). The contract also provided that the work was to be commenced promptly after receipt of a notice to proceed and was to be completed not later than the date provided in the general construction contract (Art. 1; R. 7, 20). The specifications for plumbing required the plumbing work to be performed "in harmony with other work on the building" and "at such times as may be directed by the Superintendent of Construction, so as not to delay any other work on the buildings."

The Government's prior contract with the general contractor, signed April 21, 1932, provided that the work was to be completed within 250 calendar days after the date of receipt of the notice to proceed (R. 20). Notice to proceed was given by the Government to the general contractor on May 9, 1932, and to the respondents' company on May 12, 1932 (R. 20). Accordingly, the work was to be completed on January 14, 1933 (R. 20). Excavation work was commenced immediately after May 9, 1932, by the general contractor, and

sometime before June 6, 1932, it was discovered that instead of the solid foundation bearings indicated by the specifications, the site was underlain by soft soil, water, and quicksand. On June 6, 1932, the contracting officer ordered all construction work stopped pending decision as to what was to be done. After a number of soil tests had been made, it was decided to relocate the building, and new plans and drawings were prepared. Change orders under Articles 4 and 3 were issued, and an equitable adjustment, increasing the amount due to the general contractor by $103,489.49, was made; this amount included the sum of $63,360.57 for costs due to "extra work and delay" necessitated by the changed conditions encountered (R. 22–24).

The D. C. Engineering Company had been notified by the general contractor that sufficient progress on the foundations would be made to enable it to commence its work on June 6, 1932. Accordingly, the company employed its superintendent, and, prior to June 4, 1932, shipped its tools, equipment, and material to the site. On June 6, 1932, the company's president and superintendent arrived to begin operations, but on that day all work was stopped because of the subsurface conditions encountered (R. 22–23). During the period of suspension of work from June 6 to August 8, the respondents' company protested that it should not be required to proceed with its work in the wintertime unless an equitable adjustment in the amount due it were made under Articles 4 and 3

of the contract to compensate for increased costs due to the delay. The contracting officer refused to make such an equitable adjustment. There is no showing that respondents' company appealed this rejection of its claim to the head of the department under Articles 3 and 15 of the contract (R. 24).

Excavation on the new site was commenced by the general contractor on August 9, 1932, and the work had progressed far enough by October 8, 1932, to permit the D. C. Engineering Company to commence its work on that date. It was required to complete the work in the very cold winter months from October 1932 to April 1933. The efficiency of its employees was much reduced and additional labor costs of $5,192.49 were incurred. The salary of the superintendent during the period of delay, from June 6, 1932, to October 8, 1932, was $1,170. The company's overhead during this 126-day period amounted to $2,987.46 (R. 24–25).

Respondents brought suit to recover these sums, among others (R. 1–6, 16). The Court of Claims entered judgment for them for the total amount of these damages, $2,349.95 (R. 26). Other claims of respondents for damages for other delays were denied (R. 25–26) and are not here involved.

REASONS FOR GRANTING THE WRIT

The decision below announces a novel and far-reaching extension of Government liability under standard form contracts for delays in perform-

ance, long one of the most fruitful sources of litigation in the Court of Claims. The contrariety of views expressed in the four opinions delivered in the case emphasizes the desirability of obtaining an authoritative decision by this Court. The opinion of the court was delivered by Judge Littleton, but only one other judge concurred in the views therein expressed. This opinion proceeded primarily on the ground that the company was entitled to rely upon the specifications for the building construction and that the refusal of the contracting officer to make an "equitable adjustment" under Article 4 constituted a breach of contract (R. 26–32). Judge Green, while concurring in these views, went "farther than this" and held that the Government impliedly warranted that the time specified for completion was adequate and that the contracting officer's stop order therefore constituted a breach of contract (R. 32–33). Chief Justice Whaley and Judge Jones apparently concurred on this second ground alone and concluded that Article 4 was inapplicable (R. 34). The decision, as appears from Judge Madden's dissent, ignores settled principles and the provisions of the contract, and presents questions of substantial importance which should be settled by this Court.

1. The question whether the Government impliedly warrants the adequacy of the time for completion set forth in a standard form construction contract is one of manifest importance. The standard form contract normally includes a pro-

vision fixing the time for completion, together with a clause obligating the contractor to pay liquidated damages for delays unless due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor." The decision below holds the Government accountable for all delays caused by any unforeseen condition beyond the control of either party, delays which are inevitable in normal times and which must occur with ever increasing frequency during the emergency due to the difficulty of scheduling the limited supplies available. The imposition of such liability without fault threatens the Government with incalculable losses under existing contracts. Past experience leaves no doubt that the decision below, if sustained, will provide the basis for numerous and substantial claims, not merely for future delays, but for those which occurred in the past within the six-year period of limitations and for which no demand for adjustment was ever made.

The decision on this aspect of the case is without support in principle, as Judge Madden's dissent makes clear, and is in conflict with the ruling of this Court in *Crook Co.* v. *United States*, 270 U. S. 4. In that case a contractor who had agreed to install, by the time the building was completed, a heating system in a repair shop being constructed for the Government, and who was delayed by the failure of the general contractors to keep to the planned schedule, was not permitted

to recover from the United States. The United States was held not to have bound itself to a fixed time for the completion of the work. Cf. *Detroit Steel Products Co. v. United States*, 62 C. Cls. 686, 695, certiorari denied, 275 U. S. 525.

The contrary conclusion reached by the court below in the present case disregards the whole structure of the standard form contract. Article 8 (g) of the Standard Specifications for General Conditions reserves to the Government the right "to suspend any portion of the contract work whenever the Administrator [of Veterans' Affairs] deems it necessary for the purpose or advantage of the work." Liability for delay resulting from such stoppages cannot, therefore, be based on breach of contract but must be derived from some express undertaking in the contract to make compensation. Yet the only ground of decision concurred in by a majority of the judges subjects the Government to liability without regard to Article 4, the only express provision which could be applicable.[2]

2. Article 4 of the standard form construction contract provides that if, during the course of the construction, it is discovered that the subsurface

[2] The case of *United States v. Spearin*, 248 U. S. 132, the only case cited by Judge Green for the view that the Government impliedly warranted the adequacy of the time for completion, involved physical specifications and does not even remotely suggest that there is an implied warranty as to time.

conditions at the site differ materially from those shown on the drawings or indicated in the specifications, the contracting officer shall, with the written approval of the head of the department or his representative, make such changes in the drawings and specifications as he may find necessary and shall make an equitable adjustment in the contract, under the provisions of Article 3, to reflect any increase or decrease of cost and any difference in time resulting from the changes (R. 8).[3] Two of the judges of the court below

[3]Articles 3 and 4 provide as follows:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the con-

held that the United States was liable to respondents because of these provisions of Article 4.

The question on this aspect of the case is whether damages may be recovered for a delay in the time for performance by one contractor resulting from the discovery of physical conditions at variance with the specifications for the work of another contractor. This question, while of narrower scope than the question discussed above, is nonetheless one of substantial importance. It has been common practice to let to several prime contractors separate parts of construction projects. A number of petitions for damages in situations similar to that in the present case are now pending in the Court of Claims and it may reasonably be assumed that others will be filed.[4]

The view of Judges Littleton and Green that the Government is accountable to respondents under

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tracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

[4] *Algernan Blair Co.* v. *United States*, No. 43548; *Wm. Eisenberg & Sons, Inc.* v. *United States*, No. 44772; *Hunter Steel Co.* v. *United States*, No. 43969; *Joseph A. Holpuch Company* v. *United States*, Nos. 43808, 43813; *M. H. Pagenhardt & Co.* v. *United States*, No. 45505.

Article 4 is, we believe, contrary to fundamental principles. In the absence of some provision to the contrary in the contract, the discovery of unforeseen conditions does not excuse performance by the contractor nor entitle him to additional compensation. *Day* v. *United States,* 245 U. S. 159; *Maryland Dredging Co.* v. *United States,* 47 C. Cls. 557; 6 Williston, *Contracts,* p. 5507. And while a contractor may rely upon the specifications for his own work, the adequacy of which the Government impliedly warrants (*United States* v. *Spearin,* 248 U. S. 132; *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1), the undertaking of the Government should not, we submit, be construed as a warranty to all contractors of the adequacy of the separate specifications for the work of each of them. We do not think it can reasonably be said that the physical specifications for the work of the general contractor may be relied upon by those contracting to do other work which is dependent upon the progress of the general construction work only with respect to the time for performance. In this view, the risk that the work of the plumbing, heating, and electrical contractor may be delayed because the specifications for the work of the general construction contractor are inadequate stands on no different footing than the risk inherent in the possibility that strikes, floods or other similar factors may affect the time of completion of the general construction contract. Cf. *C. A. Hooper Co.* v. *United States,* 40 F. Supp.

491 (W. D. Wis.); *G. & H. Heating Co.* v. *United States*, 63 C. Cls. 164. That this was the understanding of respondents' company in the present case is evident from the fact that it placed no reliance on Article 4 in the court below.[5]

If there was no implied warranty to respondents' company of the adequacy of the specifications for the general construction work, it seems clear that there can be no recovery under Article 4. The purpose of including Article 4 in the standard form contract was quite obviously to prevent stoppages by a contractor for breach of an implied warranty as to specifications; the reach of the provision must be construed accordingly.

Even if Article 4 were applicable, however, no recovery should have been granted in this case because there is no showing that an appeal from the contracting officer's rejection of the company's claim under Article 4 was made to the head of the department, as provided in Articles 3, 4, and 15 (R. 24), and because, in any event, Article 4 does

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[5] The cases cited by Judge Littleton are not in point. Only three involve liability to one contractor for delay in the work of another and in all of them it was found that the Government had contracted to have conditions ready for the beginning of plaintiff's work. *Cotton* v. *United States*, 38 C. Cls. 536; *Miller* v. *United States*, 49 C. Cls. 278; *Edge Moor Iron Co.* v. *United States*, 61 C. Cls. 392. The Government undertook no such obligation here, as Judge Littleton apparently recognized. The only case we have found which supports Judge Littleton's view is the 4–3 decision of the New York Court of Appeals in *Cauldwell-Wingate Co.* v. *New York*, 276 N. Y. 365.

not obligate the United States to make compensation for increased costs due to mere delays resulting from change orders.

3. The present case climaxes a line of recent decisions by the Court of Claims gradually removing the heretofore established limitations on the Government's liability for delays. The Court of Claims had long held that a delay resulting from the issuance of a change order under Article 3 or predecessor clauses afforded no basis for a claim against the United States.* Following an intimation in *Karno-Smith Co.* v. *United States*, 84 C. Cls. 110, however, the court held that delays caused by change orders altering specifications pursuant to Article 4 constituted an actionable breach of contract for which recovery could be had even in the absence of compliance with the standard contract procedure, expressed in Article 3, for timely protest or administrative appeal. *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461; *Sobel* v. *United States*, 88 C. Cls. 149;

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* *McCord* v. *United States*, 9 C. Cls. 155, affirmed *sub nom. Chouteau* v. *United States*, 95 U. S. 61; *Swift & Co.* v. *United States*, 14 C. Cls. 208, 232–233; 14 C. Cls. 235; *Moran Bros. Co.* v. *United States*, 61 C. Cls. 73, 102; *Lange* v. *United States*, 61 C. Cls. 666, 682, certiorari denied, 273 U. S. 708; *Carroll* v. *United States*, 69 C. Cls. 435; *Fore River Shipb. Co.* v. *United States*, 62 C. Cls. 307, 317; *Newport News Shipb. & Dry Dock Co.* v. *United States*, 79 C. Cls. 1, 19–23; 79 C. Cls. 25, 34–35; 79 C. Cls. 37, 45; 79 C. Cls. 46, 53; *Leavering & Garrigues Co.* v. *United States*, 73 C. Cls. 508, 523; *Griffiths* v. *United States*, 74 C. Cls. 245; *Snare & Triest Co.* v. *United States*, 75 C. Cls. 326, 349–350.

Stapleton Construction Co., Inc. v. *United States*, 92 C. Cls. 551; *Herbert M. Baruch Corp., Inc., Ltd.* v. *United States*, 92 C. Cls. 571, 93 C. Cls. 107; *Hirsch* v. *United States*, No. 42997, decided November 3, 1941; but cf. *Nelson Construction Co.* v. *United States*, 91 C. Cls. 476; *Seeds & Derham* v. *United States*, 92 C. Cls. 97. In *Ross Engineering Co., Inc.* v. *United States*, 92 C. Cls. 253, the court held the Government liable for delaying beyond what it found to be a reasonable time in giving the contractor notice to proceed, notwithstanding the contractor's undertaking to commence work "as soon as practicable after receipt of notice to proceed" (p. 258). That decision, read with the holding in the present case that the Government warrants the adequacy of the time for completion after notice to proceed has been given, apparently removes all limitations on the Government's liability for delays without fault. Indeed, Judge Littleton's opinion expressly states that the Government is required to respond in damages unless, under the contract provisions and specifications, it is affirmatively "relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible."[1] Review by this Court, the only tribunal to

[1] Even where it is conceded that both parties are mutually responsible for delays, the court apparently places the burden upon the United States of negativing its responsibility for the entire delay. *H. W. Zweig Co.* v. *United States*, 92 C. Cls. 472.

which appeal may be had, is now required, we submit, if the Government's accountability is to be kept within proper limits.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

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